150 US 417

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1187~~. ~~702~~ ~~358~~ 116

LEVERETT SALTONSTALL, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF BOSTON AND CHARLESTOWN, PLAINTIFF IN ERROR,

VS.

JOSEPH BIRTWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JUNE 11, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1187.

LEVERETT SALTONSTALL, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF BOSTON AND CHARLESTOWN, PLAINTIFF IN ERROR,

VS.

JOSEPH BIRTWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 *Writ of error.*

UNITED STATES OF AMERICA, SS:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting.

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Joseph Birtwell, merchant, of Boston, in the Commonwealth of Massachusetts, plaintiff, and Leverett Saltonstall, collector of the customs for the revenue district of Boston and Charlestown, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the honorable Melville W. Fuller, Chief-Justice of the said Supreme Court, the twelfth day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by

LE BARON B. COLT,
U. S. Circuit Judge.

2 *Return on writ on error.*

Circuit court of the United States, district of Massachusetts, ss.

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John G. Stetson, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court this eighteenth day of October, A. D. 1889.

[SEAL.] JOHN G. STETSON,
Clerk.

3 UNITED STATES OF AMERICA,
Massachusetts district, ss:

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Wednesday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-nine, before the honorable Thomas L. Nelson, district judge.

JOSEPH BIRTWELL, MERCHANT, OF BOSTON, IN the Commonwealth of Massachusetts, plaintiff, *v.* LEVERETT SALTONSTALL, COLLECTOR OF THE customs for the revenue district of Boston and Charlestown, defendant, in an action of contract.	No. 3128. Law docket.

Plaintiff's declaration.

(Filed Oct. 15, 1888.)

First count: And the plaintiff says that the defendant owes him eighteen hundred and seventy-five dollars according to the account annexed hereto.

4 *Plaintiff's specification of items in account annexed.*

BOSTON, *July* 3, 1888.

Leverett Saltonstall, collector, etc., to Joseph Birtwell, Dr.

Feb. 29, 1888. To excess of duty paid on 432 pieces of manufactures of iron entered ex steam-ship *Jan Breydel*, Feb. 27, 1888.	$1,800
Mch. 14, 1888. To excess of duty paid on 4 pieces of manufactures of iron entered ex steam-ship *Petre de Connick*, Mch. 14, 1888	75

Second count: And also for that on the day of the purchase of this writ, the said defendant being indebted to the plaintiff in the sum of eighteen hundred and seventy-five dollars, demanded, exacted, and received of the plaintiff by the defendant, then and now collector of the customs for the revenue district of Boston and Charlestown, under color of a law of the United States for the collection of duties on imports, and by the plaintiff paid under protest, and before that time had and received by the defendant to the plaintiff's use, in consideration thereof promised to pay the plaintiff when he should be thereto afterwards requested; yet said defendant has not paid the same or any part thereof, though thereto often requested.

J. P. TUCKER,
Plaintiff's Attorney.

5 *Agreement and answer.*

To the damage of the said plaintiff, as he says, the sum of five thousand dollars.

The writ in this cause is dated the third day of July, A. D. 1888, and was duly entered at the October term of this court, A. D. 1888, when and where the parties appeared by their respective attorneys.

At the said October term, A. D. 1888, the following agreement was filed:

Agreement to waive a jury.

(Filed Dec. 26, 1888.)

It is hereby agreed to waive a jury in the above-entitled cause and that the same may be tried and determined by the court without the intervention of a jury as provided in sections 649 and 700 of the Revised Statutes of the United States.

J. P. Tucker,
Attorney for Plaintiff.
T. H. Talbot,
Ass't Dist. Att'y, for Defendant.

At the said October term the following answer was filed:

Answer.

(Filed Feb. 5, 1889.)

And now comes the defendant, and for answer denies each and every allegation in the plaintiff's declaration contained as fully and specifically as if each allegation were separately and in order denied.

O. A Galvin,
U. S. Attorney.
By T. H. T., *Ass't.*

6 Issue being thus joined, this cause came on to be heard by the court, the honorable Le Baron B. Colt, circuit judge, sitting, and was fully heard. This cause was thence continued to this present May term, when, on the twenty-sixth day of September, the court make their findings of fact and law, and the same are filed accordingly, as follows:

Findings of fact and law.

(Filed Sept. 26, 1889.)

1st. That as a matter of law the descriptions of iron in the clause under which the defendant acted in this case refer to and are intended to provide for such described forms and shapes of iron in that condition of manufacture when they are complete and merchantable, salable, and dealt in as such described forms and shapes of iron, and do not refer to or provide for such forms and shapes of iron when they have been advanced by manufacture beyond such merchantable, salable condition to and for a specific purpose and use as a new product or component parts of a new product.

2nd. It is found as a fact that the imports in this case were not within the descriptions of iron provided for in the clause under which the defendant acted as understood, considered, and treated in trade among dealers, users, and manufacturers in 1883 and since that time.

3rd. It is found as a fact that the described forms and shapes of iron provided for in the clause under which the defendant acted are as understood in trade among dealers, users, and manufacturers complete as
7 such described forms and shapes of iron when they are completed
by rolling and squaring ends, and it is further found as a fact that the imports in this case had been, since completed by rolling and squaring ends, advanced by manufacture, fitting, shaping, etc., and made complete, ready, and intended for use as component parts of the frame or foundation of the floor in the third story of the court-house now being erected in Boston.

4th. It is further found as a fact that in commercial designation, habit, and dealing among merchants, users, and manufacturers, the descriptive words applied to iron in the clause used by the defendant did in 1883 mean or refer to such described forms and shapes of iron as are rolled with ends squared, and did exclude such described forms and shapes of iron when manufactured beyond such rolled condition to and for a special particular use and purpose.

5th. It is further found as a fact that the imports in this case could not be bought and sold in the open general market at regular prices as and for any of the descriptions of iron named in the clause under which the defendant acted.

6th. It is further found as a fact that the plaintiff duly protested to the defendant collector against the exaction of the duty paid, and appealed to the Secretary of the Treasury, who affirmed the action of the defendant, whereupon the plaintiff in due time brought this suit.

It is thereupon considered by the court, to wit, October 12, 1889, the honorable Le Baron B. Colt, circuit judge, sitting, that the said Joseph Birtwell, plaintiff, recover of the said Leverett Saltonstall, defendant, the sum of eighteen hundred and fifty-three dollars and seventy-five cents damages, and his costs of suit taxed at sixty-five dollars and forty-two cents.

A true record.

Attest:

JOHN G. STETSON,
Clerk.

8 *Opinion of the court.*

The following is the opinion of court in accordance with which judgment was entered in favor of the plaintiff.

Circuit court of the United States, district of Massachusetts.

JOSEPH BIRTWELL
v.
LEVERETT SALTONSTALL.
No. 3128 law docket.

Opinion of the court.

[August 6, 1889.]

Colt, J. The plaintiff in this case imported from Antwerp the iron work for the foundation or frame of the floor in the third story of the new court-house in Boston. Each piece of iron was manufactured, fitted, punched, and shaped for its special place in the floor frame. The defendant exacted a duty of 1¼ cents per pound upon all of this iron under that provision of schedule C, of the act of March 3, 1883, which provides as follows:

"Iron or steel beams, girders, angles, joists, channels, car-truck channels, TT, columns, and posts or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel, one and one-fourth of one cent per pound." (22 Stat. at Large 499.)

The plaintiff contends that this iron work should only have been assessed with a duty of forty-five per cent. ad valorem, under the following provision in the same schedule:

"Manufactures, articles or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron * * * and whether partly or wholly manufactured forty-five per centum ad valorem."

9 The contention of the plaintiff is that the description of iron provided for in the clause of the law under which the defendant acted refers to such described forms and shapes of iron in their ordinary completed condition as such forms and shapes, and does not refer to or include such described forms and shapes after they have been advanced, or taken for a special, particular use, and manufactured into a new product.

On the other hand, the collector contends that as the importation was composed of beams, girders, etc., although they may have been designed for a special purpose, the duty was properly assessed, and further, that the general words, "all other structural shapes of iron or steel," in the last part of clause referred to, are broad enough to cover this importation if it can not, strictly speaking, be classified under the first enumeration.

Upon the face, this case seems to raise a nice question of construction under the two provisions of the statute which have been cited, but when we come to examine the policy of the courts and the Treasury Department in their interpretation of similar laws relating to the assessment of duties, I do not think the proper solution of the question is very difficult. It must be always borne in mind that what was imported in this instance was not the beams, girders, and angles as known to commerce, nor a structural form, commercially speaking, but a new article of manufacture. The fact that this floor frame may have been composed of beams and other articles specifically enumerated in the same clause of the statute, or that when the frame was taken to pieces the beams might have been sold as beams, or have become, in a commercial sense, merchantable beams (which is not proved, the weight of evidence being rather to the contrary), does not, in my opinion, change the classification which should be made. A steam engine or a loom may be made up of many things specifically enumerated in the statute, and it may be when separated into their parts some of those parts might become merchantable, commercially speaking, but for purposes of
10 revenue classification, the article imported retains its identity as one thing. If the thing imported has passed through a process of manufacture, the stage or degree of manufacture seems to have no weight in the determination of a proper assessment. Tyre & Spring Works Co. *v.* Spaulding, 116 U. S., 541, is an instructive case. The article there imported was known as "steel tire blooms," and it was made by reheating and hammering a round ingot of steel. The court held that it was prop-

erly assessed under the provision "all manufactures of steel * * * not otherwise provided for * * * but all articles partially manufactured shall pay the same duty as if wholly manufactured;" and that it did not come under the provision, "steel in any form not otherwise provided for." So, in the present case, the articles were once beams, girders, and angles, but from being ordinary beams, girders, and angles they have passed through a stage of manufacture, by fitting, shaping, cutting, and punching, and they have become component parts of a frame for the foundation of a floor in a particular building. When the materials composing this frame were manufactured into something else, designed for a special purpose, they were no longer dutiable as such, but the product became dutiable as a manufacture of iron. In Badger *v.* Ranlett, 106 U.S., 255, the importation was strips of band and hoop iron cut a certain length and tied up in bundles with buckles attached to each bundle. The law provided for "band or hoop iron," and also for manufactures of iron not otherwise provided for. The collector exacted duties as upon band and hoop iron, while the importer contended that they were a manufacture of iron not provided for, namely, cotton ties, and the court so held. In the unreported case of Whitney *v.* Arthur, in the southern district of New York, referred to in Executive Document No. 22, p. 52, of the 47th Congress, the merchandise was galvanized iron cut into sheets and ready for use as roofing iron. It was classified for duty as galvanized iron, but
the importer claimed that its correct classification was under man-
11 ufactures of iron not otherwise provided for. The trial resulted in
favor of the importer, and the Department acquiesced in the decision, and directed the payment of the excess of duties exacted. In Scott *v.* McClung, tried in the circuit court for the southern district of Ohio, in 1883, and referred to in Treasury Synopsis as decision 6138, the article imported was corrugated sheet iron. The law provided for "sheet iron, common or black," also for "manufactures of iron." The jury found for the plaintiffs, classifying the imports as manufactures of iron, and the Department accepted the decision as conclusive.

The Treasury Department have made many rulings enforcing the principle of interpretation contended for by the plaintiff in this case. In 1869, Synopsis 513, the importation was tin plates turned down at the ends and fastened together for use as roofing tin, and they were held to be dutiable as manufactures of tin, and not as tin in plates or sheets. So, in 1888, Synopsis 8880, sheets of zinc specially made for printing purposes were held dutiable as manufactures of zinc, and not as zinc in sheets. Other instances might be given, but enough has already been said to show the rulings of the courts and of the Department on this question.

I had some doubt in my own mind at first as to what might properly be included under the term "structural shapes of iron," as used in the clause relied upon by the collector, but I am satisfied from the specific enumeration which precedes, and from the evidence of those engaged in this branch of business, that these words were not intended by Congress, and do not, in a commercial sense, cover the importation in controversy in this case. It appears from the evidence that, speaking in a broad and commercial sense, the term "merchantable iron" is limited to rounds, squares, and flats, that anything else, such as beams, girders, angles, etc., having any special shape, and intended to be used in the form of a structure,

is a structural shape. In this sense, this floor foundation may be
12 said to be made of structural shapes. To give these words a wider
signification would be to extend them beyond known commercial
usage, and if we do that it may be difficult to draw any line; for, in one
sense, most every article of iron imported may be said to possess structural
shape.

For these reasons, I am of opinion that judgment should be entered in this case for the plaintiff, for the excess of duties exacted by the defendant.

Judgment for plaintiff.

13 The following is the assignment of errors filed by the defendant to be transmitted with the record herein.

Assignment of errors.

(Filed Oct. 18, 1889.)

And now under writ of error sued out the defendant makes the following assignment of errors.

He says that said judgment is erroneous in that the facts are not sufficient to authorize the same in law. And that said judgment is erroneous, upon the facts found, in not being a judgment in favor of the defendant.

By his attorney.

THOMAS H. TALBOT.

14 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings, including the opinion of the court and the defendant's assignment of errors in the cause entitled No. 3128. Joseph Birtwell, plaintiff, *v.* Leverett Saltonstall, defendant, determined in said circuit court.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Boston, in said district, this eighteenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

[SEAL.] JOHN G. STETSON,
Clerk.

15 (Indorsement on cover:) No. 1187. Leverett Saltonstall, collector of customs for the district of Boston and Charlestown, plaintiff in error, *vs.* Joseph Birtwell, Massachusetts C. C. U. S., filed June 11, 1890.

○

[illegible]

[illegible]

JAMES H. McKENNEY,

[illegible]

150-417

CASE No. 14052.

In the Supreme Court of the United States.

October Term, 1893.

Leverett Saltonstall, collector for the district of Boston and Charlestown, plaintiff in error,
vs.
Joseph Birtwell.
} No. 116.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

LEVERETT SALTONSTALL, COLLECTOR for the district of Boston and Charlestown, plaintiff in error, *vs.* JOSEPH BIRTWELL.	No. 116.

This was an action to recover duties paid under protest. The importations were made in 1888, so that the case is governed by the tariff law of 1883. The action was tried before Judge Colt under a stipulation waiving a jury as provided in sections 649 and 700 of the Revised Statutes. The judge decided in favor of the importer, and the collector assigns error.

ASSIGNMENT OF ERROR.

The sole assignment of error to which the court's attention is called is "that said judgment is erroneous in that the facts are not sufficient to authorize the same in law."

STATEMENT OF FACTS.

The findings of fact in this case are inartificial and defective. The articles imported are nowhere described further than to state that they are made of iron, that they have been rolled and the ends squared, and that subsequently they have been "advanced by manufacture, fitting, shaping, etc.," for use as parts of a floor frame, as below quoted. It does not appear from the pleadings or findings upon what section of the statute either party rested his claim, or even what sum was charged by the collector.

The findings are as follows (excluding the first, which is a finding of law, not fact, and the sixth, which relates to the protest and appeal prior to suit brought):

> Second. It is found as a fact that the imports in this case were not within the descriptions of iron provided for in the clause under which the defendant acted as understood, considered, and treated in trade among dealers, users, and manufacturers in 1883 and since that time.
>
> Third. It is found as a fact that the described forms and shapes of iron provided for in the clause under which the defendant acted are as understood in trade among dealers, users, and manufacturers complete as such described forms and shapes of iron when they are completed by rolling and squaring ends, and it is further found as a fact that the imports in this case had been, since completed by rolling and squaring ends, advanced by manufacture, fitting, shaping, etc., and made complete, ready, and intended for use as component parts of the frame or foundation of the floor in the third story of the court-house now being erected in Boston.

Fourth. It is further found as a fact that in commercial designation, habit, and dealing among merchants, users, and manufacturers, the descriptive words applied to iron in the clause used by the defendant did in 1883 mean or refer to such described forms and shapes of iron as are rolled with ends squared, and did exclude such described forms and shapes of iron when manufactured beyond such rolled condition to and for a special particular use and purpose.

Fifth. It is further found as a fact that the imports in this case could not be bought and sold in the open general market at regular prices as and for any of the descriptions of iron named in the clause under which the defendant acted.

The opinion of the court throws a little more light on the case. Whether it can be looked to for an explanation of the findings, and what, if so, would be the result of the examination, will be discussed hereafter.

ARGUMENT.

I.

If, as is respectfully submitted, the deficiencies in the findings can not be supplied from the opinion, it becomes necessary to reverse the judgment and direct a *venire de novo.*

"The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (Revised Statutes, § 649.) Upon writ of error, "when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment." (*Id.*, § 700.)

From the two sections just quoted the following rules have been deduced by this court: First, when the finding is general, this court is not authorized to review it, and the writ of error must, therefore, be dismissed or the judgment affirmed; second, when the findings are special they are to be treated upon appeal precisely like a special verdict at common law; third, therefore, if the facts specially found are not sufficient to support the judgment, it must be reversed as in the case of similar insufficiency in a special verdict. Findings can not be implied or intended to support the judgment. If the findings are clear and show that plaintiff in error should have been successful, the judgment is reversed and a judgment absolute directed in favor of the plaintiff in error. If the findings are defective so that the court can not tell in whose favor the issue should be decided, a *venire de novo* is necessary. It is believed that the authorities upon these rules are entirely unanimous in this court and supported by decisions elsewhere, as well as by sound principle.

> In *Chesapeake Insurance Company* v. *Stark* (6 Cranch, 268, 273) the jury, in a special verdict, found part, but not all of the facts necessary to a decision. The court, speaking by Chief Justice Marshall, said: "The facts are therefore found defectively; and for that reason a *venire facias de novo* must be awarded." The same result was reached at the same term of court in *Livingston* v. *The Maryland Insurance Company* (6 Cranch, 274).
>
> In *Barnes* v. *Williams* (11 Wheat., 415), "Marshall, C. J., stated that, upon inspecting the record, it had been discovered that the special verdict found in the case was too imperfect to enable the court to

render a judgment upon it. * * * Although, in the opinion of the court, there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff." Hence a *venire facias de novo* was directed.

McArthur v. *Porter's lessee* (1 Pet., 626) is an instructive case. In this case a verdict was found, subject to the opinion of the court, on a question reserved concerning a certain deed. The deed was not incorporated in the verdict or set forth in the record in such a way as to enable the court to identify it in accordance with the rules of appellate procedure. This court, therefore, speaking again by Chief Justice Marshall, declared the verdict too imperfect to sustain a judgment, and directed a *venire facias de novo*.

Prentice v. *Zane's administrator* (8 How., 470) arose upon a special verdict, not finding sufficient facts to support the judgment. The judgment was sustained by a majority of the court by reason of a stipulation of counsel which was considered to supply all defects; three judges dissenting, two holding that there should have been a reversal, and one that the record should have been returned to the district court for amendment. It was recognized by the majority of the court, however, that a new trial would have been necessary but for the stipulation in the case, and the English authorities to this effect are set forth in the opinion of Mr. Justice Grier.

Graham v. *Bayne* (18 How., 60, 63) came up upon a stipulation of counsel "to treat the evidence in the nature of a special verdict." This court was thus forced to reverse the judgment on the ground that a special verdict must contain facts and not evidence; Grier, J., saying: "Where there is a case stated, or special verdict, the court of error must not only reverse the judgment below, if found erroneous, but enter a correct and final judgment. If a special verdict be ambiguous or imperfect—if it find but the evidence of facts, and not the facts themselves, or finds but part of the facts in issue and is silent as to others, it is a mistrial, and the court of error must order a *venire de novo*. They can render no judgment on an imperfect verdict, or case stated." These *dicta* are overruled, as hereinafter shown, so far as they relate to agreed cases. It is now held that these, if not stating the ultimate facts, do not authorize any action by the court at all, so that the record is to be treated as if it contained merely a general verdict. They are not made analogous to special verdicts by statutes and are not now so treated. They are not known to common law, but adopted from the practice of Maryland and Virginia, as explained by the court in *United States* v. *Eliason* (16 Pet., 291), and if not drawn according to such practice are simply left to the English rule, that "there is no ground of error set forth." (*Id.*, p. 300.)

In *United States* v. *Jackalow* (1 Black, 485) the indictment was for piracy and the question was one of jurisdiction, depending upon the precise spot in Long Island Sound at which the offense was committed. The special verdict located the spot with reference to the landmarks in the vicinity, but did not locate relatively the easterly line of New York State, which was a necessary element in the case. The court, speaking by Mr. Justice Nelson, held the verdict insufficient, and directed that it be set aside and a new trial granted.

In *Burr* v. *Des Moines Co.* (1 Wall., 99) all the evidence in the case was transmitted as an "agreed statement of facts," the court having made thereon a general finding of the issue in favor of the defendant. The court dismissed the case, holding that the agreed statement was not such a paper as authorized a review by the Supreme Court within *United States* v. *Eliason* (*supra*). There being no agreed statement of facts within the purview of our practice, no special verdict, and no stipulation that the evidence be treated as a special verdict, there was nothing else for the court to do. This case was decided at December term 1863. The right to review upon special findings of the court was first given in the following year by the statute of March 3, 1865, chapter 86, § 4, now incorporated in the section above quoted from the Revised Statutes.

In *Norris* v. *Jackson* (9 Wall., 125) plaintiff in error relied upon the statute of 1865. The transcript, however, after setting forth all the evidence, ended with a general finding for defendant. There being no special findings, it was held that the court could not review the judgment below on the main point at issue. There being, however, a bill of exceptions containing one exception cognizable under the statute, the writ was not dismissed, but the judgment affirmed.

In *Ryan* v. *Carter* (93 U. S., 78, 81) Mr. Justice Davis said: "Whether general or special, the finding has the same effect as the verdict of a jury, and its sufficiency to sustain the judgment is the only matter for review in this court."

In *Hodges* v. *Easton* (106 U. S., 408, 411) the judgment recited that it rested "upon the special verdict of the jury and facts conceded, or not disputed, upon the trial." No bill of exceptions was taken showing the evidence introduced by either party. Counsel in the Supreme Court did not feel authorized to consider that the facts omitted in the special verdict had been conceded at the trial. Defendant insisted as to these facts not covered by the verdict that the court "should presume, in support of the judgment, that they were, in connection with the facts specially found, sufficient to justify the action of the court below," and showed that this was the recognized practice in the State courts of Wisconsin, in which district the case had been tried. The court, however, in a carefully considered opinion by Mr. Justice Harlan, reversed the judgment and directed a new trial upon the authority of *Barnes* v. *Williams* (*supra*).

Sun Mutual Insurance Company v. *Ocean Insurance Company* (107 U. S., 485, 500) was an admiralty case governed by the act of February 16, 1875, chapter 77. Mr. Justice Matthews said: "As was decided in *The Abbotsford* (98 U. S., 440), and substantially repeated several times since, 'the facts as found and stated by the court below are conclusive. The case stands here precisely as though they had been found by the verdict of a jury.' (*The Benefactor*, 102 *id.*, 214; *The Adriatic*, 103 *id.*, 730; *The Annie Lindsley*, 104 *id.*, 185; *The Francis Wright*, 105 *id.*, 381.) Or, as it was put in *The Annie Lindsley* (104 *id.*, 185, 188): "The question, and the only question, which we can consider is, whether the facts found support the conclusions of law and the decree.' The findings of fact being in the nature of a special verdict, we can go neither behind nor beyond them. We can not correct them by inquiring into the evidence, nor supply any omissions by intendment or inference. The rule applicable to special verdicts was stated in *Collins* v. *Riley* (104 *id.*, 322, 327), "that the special verdict must contain all the facts from which the law is to arise; that whatever is not found therein is, for the purposes of a decision, to be considered as not existing; that it must present, in substance, the whole matter upon which the court is asked to determine the legal rights of the parties, and can not, therefore, be aided by intendment or by extrinsic facts, although such facts may appear elsewhere in the record," which needs qualification in its application to such cases as the present; for our jurisdiction in cases of this description, extending to a determination of the questions of law arising upon the record, may be predicated on facts which appear in any part of it, whether admitted by the parties in the pleadings, or by stipulation, or found by the court. But it is essential that the findings of fact should state the facts, and not the evidence merely, even although the evidence be sufficient to establish the fact;" citing also *Barnes* v. *Williams*, *Prentice* v. *Zane's Administrator*, *Norris* v. *Jackson*, and *Hodges* v. *Easton*, *supra*.

In *Tyre & Spring Works Company* v. *Spalding* (116 U. S., 541, 545, 546), the plaintiff in error pressed upon the court facts found in a stipulation annexed to the record, but which were not contained in the findings of the court. The court, speaking by Mr. Justice Blatchford, said that under section 700 of the Revised Statutes it was authorized "to determine whether the facts specially found by the circuit court are sufficient to support the judgment; but it can take no notice of any facts not thus specially found."

In *Allen* v. *St. Louis Bank* (120 U. S., 20, 30, 40), Mr. Justice Gray, delivering the opinion of the court, stated the question to be "whether the facts set forth in a special finding of the court, which is equivalent to a special verdict, are sufficient in law to support

> the judgment;" but held that: "All the facts of the case being ascertained by the special finding of the court below, as they would be by the special verdict of a jury, there is no reason for awarding a new trial, but there must be a general judgment for the defendants."
>
> *Raimond* v. *Terrebonne Parish* (132 U. S., 192) came up, like *Burr* v. *Des Moines Co.* (*supra*), upon a general finding, with all the evidence put in by counsel in the form of an agreed case. The judgment was affirmed for that reason, as has been done in the intervening case of *Martinton* v. *Fairbanks* (112 U. S., 670).

The rulings of this court are in line with the authorities in England and in the various States. (See English cases cited by Mr. Justice Story in *Bellows* v. *President*, etc., 2 Mason, 31, 42; *Fryer* v. *Roe*, 12 C. B., 437; *Gregory* v. *Pierce*, 4 Met., 478; *Hill* v. *Covell*, 1 N. Y., 522; *Rochester Lantern Co.*, v. *Stiles & Parker Co.*, 135 N. Y., 209; *Thayer* v. *Society of United Brethren*, 20 Pa. St., 60, 63; *Kinsley* v. *Coyle*, 58 Pa. St., 461; *Lewars* v. *Weaver*, 121 Pa. St., 268, 288.) In California, by a statute of 1861, the rule was changed, and the appellate court directed to intend findings in support of the judgment in case of deficiency. As to the result of this change the judges were divided in mind. Reversals upon technicalities were less in number, but appeals upon the judgment roll became difficult, as findings became less definite and complete when the successful party no longer found it to his interest to have them so. (See the opinions of Sanderson and Sawyer, JJ., in *Tewksbury* v. *Magraff*, 33 Cal., 237.) After a few years' trial the old system was restored by statute. (Hayne on New Trials, § 239.)

In the present case (unless the opinion can be consulted in elucidation of the record), the findings, considered as a special verdict, are not sufficient to show what judgment should be entered. The presumption is always with the collector as against the importer. (*Tyre and Spring Works Company* v. *Spalding*, 116 U. S., 541, 547.) But as the findings are not clear enough to authorize a judgment for the collector any more than for the importer, it seems necessary that a *venire de novo* be awarded.

II.

It may be claimed, however, that the opinion of the court should be examined to explain the ambiguity of the findings. This raises two questions: First, whether the opinion can lawfully be consulted, and second, what would be the result of the consultation.

(1) How far, if at all, the opinion of the court below can be considered on appeal or error to the circuit court for purpose of supplementing the record does not seem to have been subject of judicial determination here.

A long series of decisions is to be found in this court relating to the use of the opinions of the highest State courts for the purpose of ascertaining whether their determinations raised Federal questions. The early decisions, however, were based on section 25 of the judiciary act of 1789, which expressly confined the court's attention to "the face of the record." The opinion being held no part of the record (except in cases coming from Louisiana), this court refrained from consulting it. (*Williams* v. *Norris*, 12 Wheat., 117; *Davis* v. *Packard*, 6 Pet., 41, 48;

Michigan Central Railroad Company v. *Michigan Southern Railroad Company*, 19 How., 378, 381; *Rector* v. *Ashley*, 6 Wall., 142, 148; *Gibson* v. *Chouteau*, 8 Wall., 314, 317.) The act of February 5, 1867, chapter 28, § 2, having reënacted the greater part of the section above referred to, but omitting reference to the record, it was held in *Murdock* v. *City of Memphis* (20 Wall., 590, 633), that the rule was changed, and ever since then the opinion has been referred to on these questions, even in cases where, as in New York, it is not part of the record by the State practice. (*Philadelphia Fire Association* v. *New York*, 119 U. S., 110.)

No statutory language authorizes the argument that was made in the cases above cited. Section 997 of the Revised Statutes directs the court below to return with the writ of error "an authenticated transcript of the record," without providing for any such paper as an opinion. The same provision, however, is made with regard to writs of error to a State court (§ 1003).

The opinion filed with the findings upon a trial without a jury, and not made part of the record by law, corresponds to statements of the jurors in explanation of a special verdict. It has never been claimed that such statements could be considered. The practice with regard to special findings being held, under sections 649 and 700, to be the same as in the case of a special verdict, it would seem that reference to the opinion would be improper. It was, indeed, held by the supreme court of the District of Columbia, in *Strong* v. *Grant* (2 Mackey, 218, 223), that this court's opinion could be examined to elucidate its decision upon an issue of *res adjudicata*, relying upon such use by the court itself in *Cromwell* v. *County of Sac* (94 U. S., 351, 359); but the opinion considered by this court was an opinion of its own at a previous stage of the same general litigation (*Smith* v. *Sac County*, 11 Wall., 139), and of which, therefore, it was entitled to take judicial notice; and to extend the principle any further than this would be contrary to the general weight of authority upon questions of *res adjudicata* (*Buckingham's Appeal*, 60 Conn., 143, 160; *Re Allsop & Joy's Contract*, 61 Law Times, 213; *Robinson* v. *N. Y., L. E. & W. Ry. Co.*, 64 Hun., 41), as well as upon appeal (*Williams* v. *Norris*, *supra; Direct U. S. Cable Co.* v. *Dominion Telegraph Co.*, 84 N. Y., 153; *Pennsylvania Co.* v. *Versten*, 140 Ill., 637; *Wilson* v. *Wilson*, 64 Cal., 92).

(2) If, however, the opinion may be referred to in the elucidation of the findings, it is respectfully submitted that the result should be not a reversal and new trial, but a reversal and absolute judgment for the defendant.

The opinion shows that the importation in this case was of iron work for the foundation or frame of a flooring for the court-house in Boston. The articles imported were iron beams, girders, etc., and classified by the collector as "iron or steel beams, girders," etc., "and building forms, together with all other structural shapes of iron or steel," at 1¼ cents per pound. The articles, however, had been specially "manufactured, fitted, punched, and shaped" each "for its special place in the floor frame." Plaintiff therefore contended that they were manufacturers of iron, partly or wholly manufactured, and dutiable at 45 per cent ad valorem. The statement of facts in the opinion is as follows:

> Colt, J. The plaintiff in this case imported from Antwerp the ironwork for the foundation or frame of the floor in the third story of the new court-house in Boston. Each piece of iron was manufactured, fitted, punched, and shaped for its special place in the floor frame. The defendant exacted a duty of 1¼ cents per pound upon all of this iron under that provision of schedule C, of the act of March 3, 1883, which provides as follows: "Iron or steel beams, girders, angles, joists, channels, car-truck channels, T T columns, and posts or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel, one and one-fourth of 1 cent per pound." (22 Stat. at Large, 499.) The plaintiff contends that this iron work should only have been assessed with a duty of 45 per cent ad valorem, under the following provision in the same schedule: "Manufactures, articles or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron * * * and whether partly or wholly manfactured, 45 per centum ad valorem."
>
> The contention of the plaintiff is that the description of iron provided for in the clause of the law under which the defendant acted refers to *such described forms and shapes of iron in their ordinary completed condition as such forms and shapes*, and does not refer to or include *such described forms and shapes after they have been advanced, or taken for a special, particular use, and manufactured into a new product.*
>
> On the other hand, the collector contends that *as the importation was composed of beams, girders, etc., although they may have been designed for a special purpose*, the duty was properly assessed, and further,

> that the general words, "all other structural shapes of iron or steel," in the last part of clause referred to are broad enough to cover this importation if it can not, strictly speaking, be classified under the first enumeration.

The court recognized in its opinion that the floor frame was "composed of beams and other articles specifically enumerated in the same clause of the statute," but found that, having been specially fitted for this special flooring, they were not "in a commercial sense merchantable beams," and were not "the beams, girders, and angles as known to commerce, nor structural forms, commercially speaking, but a new article of manufacture;" that "from being *ordinary* beams, girders, and angles, they have passed through a stage of manufacture by fitting, shaping, cutting, and punching, and they have become component parts of a frame for the foundation of a floor in a particular building." The court concluded that the iron beams, etc., referred to specifically in the statute were restricted to "merchantable iron" as understood "in a broad and commercial sense."

It is not stated, even in the opinion, that the articles composed an entire floor frame; that nuts, bolts, etc., were not also necessary to complete the frame, or that all the beams, girders, etc., were included in this importation. Assuming, however, that this was in fact the case, the questions will arise, first, whether a floor frame is a manufacture of iron within the meaning of the statute; second, whether the collection of structural shapes was to be regarded as already a floor frame, even though it had never been put together on the other side; third, whether the words, "beams, girders," etc., and especially the general phrases "building forms, together with all other structural shapes," are words whose meaning may be governed by testimony as to commercial usage.

It had been held by the Treasury Department upon a previous importation by these importers, that a floor frame imported in parts is not a manufacture within the meaning of the statute. (Letter of Acting Secretary Fairchild, July 3, 1886, Syn. Dec., 7678.) On an application for a rehearing, the question was referred to the Department of Justice, and an opinion to the same effect rendered by Solicitor-General Jenks (18 Op., 475), who argued that a floor frame, like a building or a railroad track, was a structure and not a manufacture; that if such things were regarded as manufactures, some of them would have appeared specifically in the tariff acts; and that the girders, beams, etc., were not a floor frame until actually put together at their final destination.

> In the latter connection, the case of *United States* v. *Schoverling* (146 U. S., 76), is of interest. In that case it was found by the board of general appraisers that Schoverling was a member of two different firms; that one firm imported gunstocks and the other firm gun barrels, "with the mutual expectation that the stocks and barrels, after arriving at New York, were to be put together so as to make completed guns;" and that this was done for the purpose of evading payment of duties. On appeal before Judge Lacombe no finding was made on the question of evasion, which, however, clearly appeared from the testimony of Mr. Daly, one of the importers. But it appeared that the gunstocks in question were never "assembled or brought together with

> the gun barrels on the other side; * * * that for all that appeared, the gunstocks might have been bought from one manufacturer and the gun barrels from another." The tariff act laid a duty upon shotguns, and left the parts of which the shotguns were composed to be assessed generally as manufactures of metal. Judge Lacombe, as quoted and approved by this court, held: "that it could be fairly assumed that Congress by that terminology meant to allow importers, who chose to do so, to bring in fragments of a combination article by different shipments, and then to employ domestic labor in putting them together; that it might have been intended to induce importers to employ to that extent the labor of this country instead of having the article combined abroad." This court's decision was not based upon the point that the gun barrels were imported in a separate ship and under a different firm name, which was a mere evasion; but the case was treated as if the importation had been made by the same firm. "In the present case the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, can not affect the rate of duty on the gunstocks as a separate importation."
>
> The case at bar differs from the Schoverling case in the fact that the completed article, as claimed by the importers, is subject to a lower rate of duty than that levied upon the separate parts. The principle, however, that the article is not complete until the parts have been put together by the employment of labor for that purpose must be the same.

If the articles are not dutiable as a united whole, on the theory that a floor frame is a manufacture, then it is respectfully submitted that they are generically building forms and structural shapes, and specifically beams, girders, etc., within the meaning of the statute, irrespective of alleged commercial designations. It will be noticed that the findings of the court are considerably broader as to the commercial designation than its opinion. The latter does not deny that the articles are known in commerce as beams, girders, etc., but finds simply that they are not known as *merchantable* articles of that description. That beams and girders are known as such, not only when fitted to be put into a particular building, but even after they have become a component part of the building, is a matter of familiar knowledge. It is submitted that they are, within the language of the court in *Hedden* v. *Richard* (149 U. S., 346, 349), "words * * * which, unless taken in the ordinary sense, would mislead the whole community, and can not, therefore, be supposed to be intended in any other sense, unless there is something to indicate such intention." The phrases "building forms" and "structural shapes" seem to be added so as to include every form of iron or steel, under whatever commercial designation, applicable to building purposes. (See *Maillard* v. *Lawrence*, 16 How., 251, 261 (wearing apparel); *Greenleaf* v. *Goodrich*, 101 U. S., 278 (goods of similar description); *Schmieder* v. *Barney*, 113 U. S., 645 (do.); *Newman* v. *Arthur*, 109 U. S., 132, 138 (number of threads in cotton cloth); *Barber* v. *Schell*, 107 U. S., 617 (manufactures of cotton); *Reimer* v. *Schell*, 4 Blatch., 328. See also *De Forest* v. *Lawrence*, 13 How., 278, 282.)

The case of *Tyre and Spring Works Company* v. *Spalding* (116 U. S., 541), relied upon by the court below, does not seem to be applicable on this point. In that case (p. 542) the ingot of steel had been reheated and hammered so as to compact its grain or fiber; a hole had been swedged through its center; it had then been hammered so as to expand its circumference and form a new grain or fiber, and finally the rudiments of a flange had been formed upon the outer periphery of the circle. There was no question in the case of specific designation. The question was simply whether the articles were steel partly manufactured, or steel in any form not otherwise provided for, that is, unmanufactured. It was held that they were partly manufactured.

Badger v. *Ranlett* (106 U. S., 255) related to an importation of cotton ties. These ties were classified by the collector as band iron, while the plaintiff claimed that they should have been classified as manufactures of iron, not otherwise provided for. The court, by Mr. Justice Blatchford, said: "The substance of the whole charge was that if the jury found that the articles were band iron, the correct duty had been imposed and the plaintiffs could not recover. The strips not being band iron, and the buckles certainly not being band iron, the proper duty was 35 per cent ad valorem." There can be no question that "band iron" is a commercial term and not understood or used by the community at large. As such, it is plainly subject to evidence of commercial designation.

The case at bar is, therefore, unembarrassed by any previous decision of the court upon this point. The question is one of general principles of statutory interpretation with relation to our tariff laws. If such a phrase as "structural shapes," used in such a connection, is subject to evidence of commercial usage, then it would seem hardly possible to devise any phraseology, short of express prohibition, which would not subject the Government to the perils of parol testimony upon a jury trial.

If the above arguments be well founded, an absolute reversal or a *venire de novo* is necessitated, unless it be considered proper to remand the cause for further findings as in *Little Miami, &c., R. R. Co.*, vs. *United States*, 108 U. S., 277.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

NO. 116.

EVERETT SALTONSTALL, COLLECTOR, ETC.,
PLAINTIFF IN ERROR,

v.

JOSEPH BIRTWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR DEFENDANT IN ERROR.

J. P. TUCKER,
Attorney for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 116.

LEVERETT SALTONSTALL, *Collector, etc., Plaintiff in Error,*
v.
JOSEPH BIRTWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The issue in this case is as to the rate of duty lawfully chargeable upon certain iron for the frame or foundation of the floor in the third story of the Court House lately erected in Boston.

Jury trial was waived by agreement (see page 3 of the record), and the law and facts were found by the Court, (pages 3 and 4 of the record).

Duty was assessed and collected at the rate of one and one fourth cents per pound by the plaintiff in error as Collector of Customs for the port of Boston under the provision in Schedule C of the Act of March 3, 1883, U. S. Stat. 499, which provides that rate for "iron or steel beams, girders, joists, angles, channels, car-truck channels T T columns and posts, or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel."

While the defendant in error contended that his imports should have been charged with a duty of forty-five per cent *ad valorem* under a provision of the same schedule, page 501 of the Statutes, which provides that rate upon "manufactures articles, or wares not specially enumerated or provided for in this act composed wholly or in part of iron . . . and whether partly or wholly manufactured."

The law, as found by the Court below, is on page 3 of the Record, *i. e.*, "That, as a matter of law, the descriptions of iron, in the clause under which the defendant acted in this case, refer to and are intended to provide for such described forms and shapes of iron, in that condition of manufacture when they are complete, and merchantable, salable and dealt in as such described forms and shapes of iron, and do not refer to or provide for such forms and shapes of iron when they have been advanced by manufacture beyond such merchantable, salable condition to and for a specific purpose and use, as a new product or component parts of a new product."

The facts found by the Court were:—

First. "That the the imports in this case were not within the descriptions of iron provided for in the clause, under which the defendant (plaintiff in error here) acted as understood, considered and treated in trade among dealers, users and manufacturers in 1883, and since that time."

Second. "That the described forms and shapes of iron provided for in the clause under which the defendant (plaintiff in error here) acted, are as understood in trade among dealers, users and manufacturers complete as such described forms and shapes of iron, when they are completed, by rolling and squaring of ends, and it is further found, as a fact, that the imports in this case had been since completed by rolling and squaring ends, advanced by manufacture, fitting, shaping, etc., and made complete, ready, and intended for use as component parts of the frame or foundation of the floor in the third story of the court-house, now being erected in Boston."

Third. "That in commercial designation, habit and dealing among merchants, users and manufacturers, the descriptive words applied to iron in the clause used by the defendant, did, in 1883, mean or refer to such described forms and shapes of iron as are rolled with ends squared, and did exclude such described forms and shapes of iron, when manufactured beyond such rolled condition, to and for a special particular use and purpose."

Fourth. "That the imports in this case could not be bought and sold in the open general market at regular prices, as and for any of the descriptions of iron named in the clause, under which the defendant (plaintiff in error here) acted."

Fifth. "That the plaintiff duly protested to the defendant collector (plaintiff in error here) against the exaction of the duty paid, and appealed to the Secretary of the Treasury, who affirmed the action of the defendant (plaintiff in error here); whereupon the plaintiff (defendant in error here), in due time, brought this suit."

ARGUMENT.

The construction of the provision of law by the Court below, under which the plaintiff in error exacted the duty complained of, is in harmony with the rule many times declared by this Court within the past fifty years.

To wit "that in imposing duties, Congress must be understood as describing the articles upon which the duty is imposed, according to the commercial understanding of the terms used in the law in our own market."

United States *v.* Two Hundred Chests of Tea, 9 Wheaton, 438.

Barlow *v.* The U. S., 7 Peters, 409.

Elliott *v.* Swartout, 10 Peters, 150.

U. S. *v.* 112 Casks Sugar, 8 Peters, 278.

Curtis *v.* Martin, 3 Howard, 109.

Arthur *v.* Morrison, 96 U. S. 111.

Arthur *v.* Lahey, 96 U. S. 118.

Arthur *v.* Butterfield, 125 U. S. 75.

American Net & Twine Co. *v.* Washington, 141 U. S. 471.

Arthur *v.* Cumming *et al.*, 91 U. S. 363.

The above list of authorities upon this point, by its numbers and period of time covered renders argument superfluous and a presumption.

The case of Arthur *v.* Butterfield, 125 U. S. 75. is specially applicable here, Mr. Justice Field speaking for this court said: "It has become a settled rule in the interpretation of statutes of this description to construe the language adopted by the Legislature and particularly in the denomination of articles, according to the *commercial understanding of the terms used.*"

The facts in this case collated are, that as understood in trade, commercially, the forms and shapes of iron described in the provision under which the duties complained of were assessed, were complete when rolled and ends squared; that the imports in this case had been advanced by manufacture beyond this complete condition of rolled and squared ends, and were fitted, shaped and made complete for a particular use in the frame or foundation of a floor in the Court House; that as understood in trade, commercially, the imports in this case were not within the descriptions used in the provision under which the duties complained of were exacted.

Upon these facts the court below decided that the imports were dutiable as manufactures, etc., under the provision contended for by the plaintiff below and gave judgment accordingly.

The case of the Tyre and Spring Works Company *v.* Spalding, in 116 U. S. 541, is analogous in principal to the case at bar. The imports in that case were "steel tyre blooms," and the Collector of Customs at Chicago exacted a duty of forty-five per cent *ad valorem* on them under a provision of law for "all manufactures of steel not otherwise provided for, and all articles of steel partially manufactured shall pay the same duty as if wholly manufactured." The contention of the plaintiffs in that case was that their imports were only chargeable with a duty of thirty per cent *ad valorem* under a provision for "steel in any form not otherwise provided for."

It appears by the report that the process of manufacture of the imports had been by taking the original casting, which is described as being a round ingot of steel somewhat in the shape of a cheese or grindstone, but without a hole in its centre and re-heating it and hammering it to reduce its thickness, and thereby contract its grain or fibre, a hole then swedged through the centre, then hammered on the beak of an anvil, thereby expanding its circumference and forming a grain or fibre in its circumferential direction. The Court below found that this was an *important stage* of *manufacture* into steel tyres and that, therefore, they were articles of steel partially manufactured. This Court on page 547 near the bottom said, "It must be assumed on the findings that these blooms were adapted and intended for tyres for car wheels . . . and it is clear, we think, that they were partially manufactured tyres of that character" . . . and were subject to forty-five per cent duty. This Court further said, near the end, "It is conceded by the Government that if these blooms were the ordinary steel blooms, that is, merely hammered steel castings, they would not be articles of steel partially manufactured . . . but would be liable to only thirty per cent duty"; the question of commercial nomenclature does not appear by the Record to have borne any part in the decision. In this case these imports were once beams, etc., but from the ordinary beams, etc., as by the facts shown, they have passed through an important stage of manufacture by fitting, shaping, etc., so that as imported they were complete as component parts of a frame or foundation of a particular floor. In that case, it was because the ordinary blooms (forms of steel) had been advanced by manufacture, looking to a special use that the Court below and this Court held them to be dutiable as "manufactures of" rather than as forms of steel.

Upon this same principle, the Court below decided this case, with the further fact not in the Tyre Bloom Case, *i. e.*, that these imports were *not* as *commercially understood* within the descriptions of the law used by the collector.

The case of Badger *v.* Ranlett, 106 U. S. 255, is directly in point. The goods in that case were strips of band or hoop iron cut to lengths of eleven feet tied up in bundles of thirty, with thirty buckles tied to the bundles. The law provided for "band or hoop iron." It also provided for "not otherwise provided for manufactures of iron." The collector at New Orleans exacted duty as upon band or hoop iron, contending that cutting band iron into strips and blacking it was not to make a manufacture of iron.

The Court below instructed the jury that the issue was whether the articles were band or hoop iron or, on the other hand, cotton ties; that this question was to be determined by *commercial usage*. The jury found that they were cotton ties and judgment followed accordingly. There was *no* enumeration of cotton ties in the law. The Court held them to be manufactures of iron. This Court sustained the judgment.

So here, the fact being found that the imports were not, as commercially understood and treated, beams, etc., but were complete component parts of the foundation of a floor, they were found by Judge Colt to be dutiable as manufactures of iron; which, it is submitted, was not error, but in full accord with the decision of this Honorable Court in the Tyre and Spring Works, and Badger cases cited.

Although in this case, the treasury department sustained the action of the collector upon the appeal of the importer, yet in *very many* cases during the past twenty years the treasury has held to the same principle declared by this Court in cases cited and by Judge Colt in the case at bar.

See Published Treasury Synopsis of decisions.

Synopsis 652, of 1870.

Split Peas. Held not to be entitled to entry, free of duty, under the provision in Reciprocity Treaty with Canadian Provinces, for "all descriptions of grain and vegetables," but were a manufactured article non enumerated.

Synopsis 797, of 1871.

Cork wood cut into squares. Held to be dutiable as cork wood manufactured, and not as "cork wood or bark unmanufactured."

Synopsis 513, of 1869.

Tin plates turned down at the ends and fastened together ready for use as roofing tin. Held to be dutiable as manufacture of tin, *not* as "tin in plates or sheets."

Synopsis 1,556, of 1873.

Dressed cony skins sewed together to be used as linings. Held to be manufactures of fur, and not as "dressed furs on the skin," provided for in the law.

Synopsis 2,713, of 1876.

"Ground Mica." Held to be dutiable as a non-enumerated manufacture, *not* as "mica" in the free list.

Synopsis 2,889, of 1876.

Yolks of Eggs, dried and salted. Held to be dutiable as non-enumerated manufactures, *not* "eggs" in free list.

Synopsis 3,532, of 1878.

Pine Seed, from which the rind or covering had been removed. Held to be dutiable as a non-enumerated manufactured article, *not* as "seeds of forest trees" provided for in the law.

Synopsis 4,677, of 1880.

Car Truck Channels, holes punched for immediate use. Held to be manufactures of iron, not as "other forms of rolled or hammered iron," provided for in the law.

Synopsis 4,726, of 1880.

Zinc in sheets prepared for engraving. Held to be dutiable as manufactures of zinc, *not* as "zinc in sheets."

Synopsis 3,351, of 1877.

Dressed bear skins with heads on (not lined), with trimming or pinking sewed on the edges intended to be made into sleigh robes. Held to be dutiable as manufactures of fur, *not* as "dressed furs on the skin."

Synopsis 5,026, of 1881.

"Shoe vamps." Held to be dutiable as manufacture of leather, *not* as "upper leather," provided for in the law.

Synopsis 4,398, of 1880.

Glass bent for a specific use. Held to be manufacture of glass, not as "window glass" provided for in the law.

Synopsis 7,166, of 1885.

Strips of steel in coils or springs for motors. Held to be

dutiable as manufactures of steel, *not* as "steel in strips" provided for in the law.

Synopsis 7,907, of 1886.

Horn strips wound with cotton. Held to be manufactures of horn, *not* "horn strips" in the free list.

Synopsis 8,180, of 1887.

Malleable iron castings, tinned. Made into bottoms, hoops and handles for milk cans. Held to be manufactures of iron, *not* "*iron* castings" provided for in the law.

Synopsis 8,037, of 1887.

Car wheel centres. Held to be dutiable as manufactures of iron, *not* as "forgings of iron".

Synopsis 8,517, of 1887.

Fur plates for coats and coat linings. Held to be articles made of fur, *not* "dressed furs on the skin," provided for in the law.

Synopsis 8,880, of 1888.

Sheets of zinc, specially made for printing purposes, cut to forms and sizes for the special purpose designed. Held to be dutiable as manufactures of zinc, *not* as "zinc in sheets" provided for in the law.

While these department decisions are of no binding effect upon the Court, yet it has been frequently held that they are entitled to consideration, they are so numerous and directly supportive of the principle governing the decision of Judge Colt in this case that a citation of them seems warranted.

The correctness of the decision of the Court below in this case is in plain language confirmed by Congress in the Act of 1890, in par. 137, schedule C, page 574, of the statutes, wherein a similar clause with that in question here (of the

Act of 1883) is enacted; the descriptive language of the two provisions is the same, but in the Act of 1890 these additional words are added: "whether plain, punched or fitted for use." The rate of duty is reduced to nine tenths of a cent per pound in place of one and one fourth cents in the Act of 1883. This is a congressional declaration that the Act of 1883 did *not* include such forms and shapes as were "punched or fitted for use" which the facts in this case show was the condition of the imports in question. If the Act of 1883 had been understood by Congress to include the punched or fitted for use, there certainly was no reason for adding the words in 1890.

It is respectfully submitted that there is no error and that the judgment of the Circuit Court should be affirmed.

J. P. TUCKER,
Attorney for Defendant in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 116.

LEVERETT SALTONSTALL, Collector, &c., Plaintiff in Error,

vs.

JOSEPH BIRTWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

REPLY BRIEF FOR DEFENDANT IN ERROR.

William A. Maury,
J. P. Tucker,
Counsel for the Defendant in Error.

Judd & Detweiler, Printers, Washington, D. C.

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REPLY BRIEF FOR DEFENDANT IN ERROR.

It is to be regretted that the brief of the plaintiff in error was filed so recently as to leave no time for the preparation of such a brief in reply as this Court has a right to expect from counsel.

THE SUFFICIENCY OF THE FINDINGS.

THE OBJECTION IS UNREASONABLE.

The objection raised by the learned counsel for the plaintiff in error is not that the findings of the court below do not cover the whole subject-matter involved in the litigation, but that they do not identify that subject-matter with sufficient distinctness and "are not *clear enough* to authorize a judgment for the collector any more than for the importer." (Brief of Plaintiff in Error, p. 11.)

It is to be observed that if there are any defects in the findings the plaintiff in error is as much responsible for them as the defendant, if not more so, and it at once becomes a grave question whether this Court will countenance objections going to the manner and not to the substance of the findings, such as are now raised here for the first time.

The findings are of such a character as to show that every detail necessary to a circumstantial presentation of the case must have been before the trial judge, and this Court cannot shut its eyes to the fact that if the plaintiff in error had applied to that judge to make his findings more specific in any reasonable particular the application would have been complied with. Is he, then, to be allowed to lie by and spring this objection on the defendant for the first time in this Court?

Is it not the established doctrine of this Court that a party shall not be permitted to raise here for the first time an objection which the Court is able to see might have been obviated if attention had been called to it in the court below?

In Burbank *vs.* Bigelow (L. C. P. Co. edition of Supreme Court Reports, Book 19, pp. 51, 52) this Court refused to hear for the first time the objection that the plaintiff's demand was of equitable cognizance, saying that "it cannot be permitted to a defendant to go to trial before a jury on the facts of a case involving fraud and let it proceed to judgment on the verdict without any attempt to assert the equitable character of the suit, and then raise that question for the first time in this Court.

It was upon this safe ethical principle that the attempt to defeat the appeal in Roberts *vs.* Reilly (116 U. S., 80) by raising the objection, for the first time here, that the case appealed from was heard by Mr. Justice Woods in his chambers, in accordance with a stipulation between the parties, failed because *it came too late* (p. 93), in spite of the rule that a party does not waive a jurisdictional objection by his silence. It was, no doubt, because the objection, if made below, would have at once resulted in a hearing in open court, or at least in the entry of the decree in open court that it was discountenanced as unseasonable.

Upon the same principle this Court refused to sustain objections to a charge on the ground that it does not go far enough, the party objecting having failed to object on that score (Express Co. *vs.* Kountze Bros., 8 Wall., 342, 353), and refused to reverse a judgment because the action was misconceived, no objection of that character having been raised below. (Marine Bank *vs.* Fulton Bank, 2 Wall., 252, 258.)

It is in the interest of justice that the court should frown on an objection of this character, unreasonably urged, where it is manifest from the record that its only result must be to defeat or delay justice. In such cases this Court has uniformly compelled the objecting party to submit to the judgment below as the author of his own misfortune. Every presumption in favor of the proceedings below will be indulged to defeat the ill-timed objection, as where a verdict is held to cure substantial defects in the pleadings. (1 Wms. Saund., 228, note 1.)

THE OBJECTION IS WITHOUT MERIT.

It is conceded (Plaintiff's Brief, page 1) that the importations were made in the year 1888 under the tariff act of 1883, and, taking all the findings together, including the first one, it is apparent that the whole question in the case was whether the importation of the component parts of the iron frame or foundation of the third-story court-house floor fell within the purview of Schedule C of the tariff of 1883, that laid a duty of 1¼ cents per pound on "iron or steel beams, girders, joists, angles," &c., or were covered by the concluding paragraph of that schedule, laying a duty of 45 per cent. ad valorem on manufactures of iron not otherwise provided for.

This Court will sustain the findings if it can collect from them, by reasonable intendment, the data necessary to enable the Court to give judgment according to the very right of the cause.

THE OPINION MAY BE REFERRED TO.

It certainly must be admissible to refer to the judge's opinion simply to identify more particularly the subject-matter of the importation.

Undoubtedly the judge's notes may be referred to to amend a verdict by applying it to the good counts of a declaration containing bad counts also. (Tidd Pr., 894; 1 Ch. Pl., 411; Matheson *vs.* Grant., 2 How., 263.)

If extraneous evidence be admissible for the purpose of showing what was precisely in issue in an action where the counts of the declaration were general and the issue was the general issue in order to make out the defense of *res adjudicata* (Steam Packet Co. *vs.* Sickles *et al.*, 24 How., 333, 344), surely the judge's opinion might be referred to to make a more particular identification of the subject-matter of the suit.

No one can doubt the propriety of referring to the declaration in an ejectment suit to help out a special verdict which refers to the *locus in quo* as the land in controversy.

It would seem to follow, therefore, that the objection is both unreasonable and invalid.

ON THE MERITS.

The following points are suggested by the learned counsel for the plaintiff in error, beginning with page 13 of his brief:

1st. That it is not stated that the articles composed an entire floor frame, or that all the beams, girders, &c., were included in this importation, and from this he suggests whether a floor frame is a manufacture of iron within the meaning of the statute.

The second finding of facts shows "that the imports in this case had been since completed by rolling and squaring ends, advanced by manufacture, fitting, shaping, etc., and made complete, ready, and intended for use as *component parts* of the frame or foundation of the floor in the third story of the court-house now being erected in Boston." The question whether or not a floor frame is a manufacture of iron is *not* material to this case. The same is true as to the immediately following point, "whether the collection of structural shapes was to be regarded as a floor frame, even though it had never been put together on the other side."

2d. "Whether the words beams, girders, etc., especially the general phrase building forms, together with all other structural shapes, are words whose meaning may be governed by testimony as to commercial usage." The learned counsel refers to this again on page 18 of his brief, and cites several cases, all of which were in relation to descriptive words or phrases of a *materially* different character from those here in question; *these* are most positively commercial descriptions, those are not. It is a matter of general knowledge and is illustrated in the tariff laws for many years, that iron and steel are described, according to *forms* or *shapes*, as blooms, billets, bars, rods, bands, beams, car trucks, channels, angles, strips, sheets, &c., &c. That they are all commercial in such application, it is submitted, is beyond reasonable question. The case of Tyng *vs.* Grinnell, 92 U. S., 467, is directly applicable to this point, the articles being claimed by the importer as "iron flues," while the collector classed them as "wrought-iron tubes." The question was settled by the fact found, that commercially they were "wrought-iron tubes." This Court affirmed the judgment. As to the general words "building forms, together with all other structural shapes," these are *forms and shapes—i. e*, building forms and structural shapes—just as all the preceding descriptive words related to forms and shapes. These general words clearly were intended to cover *any* and *all other forms* and *shapes* in the same class with those previously *named specifically* in the clause. The whole clause is clearly commercial in its terms of description by the many cases decided by this Court already cited.

3d. Referring to the Tyre and Spring Works case already cited, the learned counsel thinks it not applicable here. The real gist of that case was that certain articles of import were in the original condition *forms* of *steel*, but in the condition as imported they had been advanced by manufacture looking to a specific use. Therefore they were held dutiable as *manufactures* of, &c. "That there was no specific-designation question in that case." That is immaterial. See the Morrison case cited. As to the Badger case, in 106 U. S., already cited, the learned counsel for plaintiff in error says, "there can be no question that band iron is a commercial term." It is no more a commercial term than the descriptions in the clauses here in question. *All* refer *to recognized forms* or *shapes* commercially of iron and steel. On page 16 of his brief the learned counsel refers to the late case of U. S. *vs.* Schoverling, 146 U. S., 76. The question in that case was as to whether *gun barrels* and *gun stocks* imported separately should be taxed as shotguns, which are named in the law. The court below and this Court affirmed that each importation stood by itself and must pay duty accordingly. There is no such question here.

The learned counsel at the end of his brief says: "If such a phrase as 'structural shapes' * * * is subject to evidence of commercial usage, then it would seem hardly possible to devise phraseology, short of express prohibition, which would not subject the Government to the perils of parol testimony upon a jury trial." It has been said that this is a Government of the people and for the people. Is there any reason why the Government should *not* be subject to the "perils of parol testimony upon a jury trial" just as much as the people? This Court has said in the case of McKnight *vs.* U. S., 98 U. S., 186, there is not one law for the Government and another for the people.

It is respectfully submitted that the opposite brief presents no valid ground for disturbing the judgment.

William A. Maury,
J. P. Tucker,
Counsel for the Defendant in Error.